U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13575158

Date: JAN. 5, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior programmer analyst under the second-preference, immigrant visa classification for members of the professions holding advanced degrees. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition, and we dismissed the Petitioner's following appeal. *See In Re: 9714493*, (AAO July 10, 2020). We affirmed the Director's conclusion that the Petitioner did not demonstrate its required ability to pay the proffered wage of the offered position. We also found that the record did not establish the Beneficiary's possession of the minimum employment experience required for the position or the Petitioner's intention to employ him in the job.

The matter is before us again on the Petitioner's motion to reconsider. Upon review, we will dismiss the motion.

I. MOTION CRITERIA

A motion to reconsider must demonstrate that the prior decision misapplied law or U.S. Citizenship and Immigration Services (USCIS) policy based on the record at that time. 8 C.F.R. § 103.5(a)(3). We may grant a motion to reconsider that meets these requirements and demonstrates eligibility for the requested benefit.

II. ABILITY TO PAY THE PROFFERED WAGE

The labor certification states the proffered wage of the offered position of senior programmer analyst as $107,806 a year. The petition's priority date is July 12, 2018, the date the U.S. Department of Labor (DOL) accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

First, we note that the company has not demonstrated its "continuing" ability to pay the proffered wage of the offered position. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence"). In our appellate decision, we found that regulatory required evidence of the

Petitioner's ability to pay in 2019 was not yet available at the time of the appeal's filing. We therefore considered the Petitioner's ability to pay only in 2018, the year of the petition's priority date. We instructed the Petitioner, however, to submit copies of annual reports, federal tax returns, or audited financial statements for 2019 in any future filings in this matter.

Contrary to our instructions, the Petitioner has not filed a motion to reopen with the required 2019 evidence or explained its inability to do so. The motion to reconsider addresses only the Petitioner's ability to pay in 2018.[1]

The Petitioner argues that, when considering the growth of its business in our ability-to-pay analysis under *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), we incorrectly focused on its gross income, rather than on its net income. We found that copies of the Petitioner's federal income tax returns show that, from 2017 to 2018, the company's gross annual revenues decreased by more than 41%. The Petitioner notes that its tax returns also show continuous increases in its annual net income amounts from 2014 through 2018.

We agree that the consecutive increases in the Petitioner's net annual income constitute a positive factor in the *Sonegawa* analysis. The increases, however, are not significant enough to demonstrate the Petitioner's ability to pay the proffered wage. The tax returns show the company's generation of net income of - $44,780 in 2014, $9,512 in 2015, $10,214 in 2016, $12,293 in 2017, and $13,197 in 2018. Thus, the record does not indicate that the Petitioner has ever generated annual net income equaling or exceeding the $301,034.35 difference between the combined proffered wages and the wages the company paid its applicable beneficiaries in 2018. In fact, the record does not indicate that the Petitioner has ever generated annual net income equaling or exceeding even the $35,123 difference between the proffered wage and the 2018 wages the company paid the Beneficiary. The increases in net income therefore do not overcome the negative factors in the *Sonegawa* analysis. Those negative factors include the significant decrease in the Petitioner's annual revenues from 2017 to 2018 and the company's obligation to demonstrate its ability to pay the combined proffered wages of multiple beneficiaries.

In our appellate decision, our *Sonegawa* analysis found insufficient evidence of the Petitioner's possession of an outstanding reputation in its industry. On motion, the Petitioner asserts its receipt of a 2016 award in the city of its headquarters for "IT [Information Technology] Consulting Services."

Counsel's assertion of the Petitioner's receipt of the award, however, does not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner must substantiate counsel's statement with independent evidence, which may include affidavits and declarations. The evidence should also include information about the award's criteria. Thus, the Petitioner has not demonstrated its possession of an outstanding reputation in its industry.

[1] The record therefore does not establish the Petitioner's "continuing" ability to pay the proffered wage. Thus, even if the motion to reconsider would demonstrate the Petitioner's ability to pay in 2018, which it does not, the company would not establish its "continuing" ability to pay the proffered wage under 8 C.F.R. § 204.5(g)(2). *See also* 8 C.F.R. § 103.2(b)(14) (authorizing USCIS to deny a benefit request if a petitioner does not submit requested evidence that precludes a material line of inquiry).

The Petitioner also argues that we erred in determining its ability to pay by disregarding its $25,000 bank line of credit. The Petitioner notes that, '[i]n appropriate cases, additional evidence, such as profit/loss statements, *bank account records*, or personnel records may be submitted by the petitioner or requested by the [immigration service]." 8 C.F.R. § 204.5(g)(2) (emphasis added).

The regulation's allowance of additional ability-to-pay evidence, however, does not convince us of the probative value of the Petitioner's credit line. As explained in our appellate decision, a credit line represents a bank's unenforceable commitment to loan money. John Downes & Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). Because the Petitioner's credit line is not guaranteed, it does not establish the Petitioner's ability to pay the proffered wage. *See Rahman v. Chertoff*, 641 F. Supp. 2d 349, 352 (D. Del 2009) (affirming our determination that a credit line did not establish a petition's ability to pay). Moreover, the Petitioner's credit line is for $25,000, less than the $301,034.35 difference between the combined proffered wages and the wages the company paid its applicable beneficiaries in 2018, and even less than the $35,123 difference between the proffered wage and the 2018 wages the company paid the Beneficiary. The Petitioner's credit line therefore does not establish its ability to pay the proffered wage.

Finally, citing *Matter of Maysa, Inc.*, 98-INA-259 (BALCA May 21, 1999), the Petitioner notes that it need not pay a proffered wage until after a beneficiary obtains lawful permanent residence (LPR). The Petitioner therefore asserts that, because its beneficiaries have not yet obtained LPR status, it need not demonstrate its ability to pay their combined proffered wages.

The decision of the Board of Alien Labor Certification Appeals (BALCA) in *Maysa*, however, does not apply to these immigrant visa proceedings. First, BALCA decisions do not bind USCIS. *See* 8 C.F.R. § 103.10(b) (requiring Department of Homeland Security employees to follow only precedent decisions of the Board of Immigration Appeals and the Attorney General). Also, the *Maysa* decision interpreted a DOL labor certification regulation, not a USCIS rule for immigrant visa petition proceedings. In *Maysa*, a BALCA panel held that DOL erred in denying a labor certification application where the foreign national already worked for the employer in the offered position but was not receiving the position's proffered wage. *Matter of Maysa*, *supra*, at *2. The panel ruled that the applicable DOL regulation required the employer's payment of the wage only "when the alien begins work," meaning upon the alien's future receipt of LPR status. *Id.* at *3 (citing 20 C.F.R. § 656.20(c)(2)(1998), *recodified at* 20 C.F.R. § 656.10(c)(1)).

As noted in *Maysa, id.*, however, immigrant visa petition proceedings have different requirements than labor certification proceedings. Although an employer need not *actually pay* a beneficiary a proffered wage until he or she obtains LPR status, a petitioner in petition proceedings must demonstrate its *ability to pay* a proffered wage "at the time the priority date is established." 8 C.F.R. § 204.5(g)(2). Thus, even though the Petitioner's beneficiaries have not yet obtained LPR status, the company must demonstrate its ability to pay them from the date of the labor certification application's filing. We therefore reject the Petitioner's argument.

For the foregoing reasons, the motion to reconsider does not establish our misapplication of law or policy in finding insufficient evidence of the Petitioner's ability to pay the proffered wage.

II. THE REQUIRED EXPERIENCE

The Petitioner argues that we erred in finding insufficient evidence of the Beneficiary's qualifying experience for the offered position of senior programmer analyst. To qualify, the Petitioner must demonstrate the Beneficiary's possession of at least five years of IT-related experience. The Petitioner submitted letters from the Beneficiary's former employers, asserting the letters' documentation of about five years, six months of IT-related experience. We discounted a letter purportedly verifying more than one year of employment, however, because it did not describe the Beneficiary's experience. The Petitioner characterizes the basis of our denial as "a miniscule technicality" and asserts that "there is no legal authority" for the petition's denial on that ground.

Contrary to the Petitioner's assertion, however, the regulation at 8 C.F.R. § 204.5(g)(1) authorized the petition's denial on this ground. The regulation states:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and *shall include* the name, address, and title of the writer, and *a specific description of the duties performed by the alien* or of the training received.

8 C.F.R. § 204.5(g)(1) (emphasis added).

Contrary to the regulation, the Petitioner submitted an experience letter lacking "a specific description of the duties performed by the alien." The letter therefore does not constitute required evidence of the Beneficiary's experience. Thus, the Petitioner did not demonstrate the Beneficiary's possession of the requisite five years of qualifying experience.

The Petitioner notes that 8 C.F.R. § 204.5(g)(1) requires consideration of other documentation of a beneficiary's experience "[i]f [the required] evidence is unavailable." The Petitioner, however, has not established, or even asserted, the unavailability of a letter from the former employer that describes the Beneficiary's experience. The Petitioner therefore has not established the Beneficiary's qualifying experience under this part of the regulation.

The Petitioner also argues that, because the discounted letter identifies the Beneficiary's former position as "Software Engineer," the letter establishes his qualifying IT-related experience. The Petitioner states: "The job title in and of itself should be sufficient."

As previously indicated, however, the regulation at 8 C.F.R. § 204.5(g)(1) requires an experience letter to include "a specific description of the duties performed by the alien." Thus, the job title alone is insufficient.

In addition, the Petitioner contends that, because the other experience letters state the Beneficiary's position as a software engineer and include descriptions of his duties, the discounted letter need not describe his duties. The Petitioner states that "the AAO [Administrative Appeals Office] can easily surmise the job duties of the Software Engineer position which was missing the description."

The regulation, however, requires all experience letters to include job-duty descriptions. *See* 8 C.F.R. § 204.5(g)(1) (stating that "letter(s) . . . shall include . . . a specific description of the duties performed by the alien"). The other regulatory-compliant letters therefore do not atone for the deficient letter.

For the foregoing reasons, the motion to reconsider does not demonstrate our misapplication of law or policy in finding insufficient evidence of the Beneficiary's qualifying experience for the offered position.

III. INTENTION TO EMPLOY IN THE OFFERED POSITION

Our appellate decision noted the Petitioner's forfeiture of its corporate status in its home state, casting doubt on its intention to continue business operations.[2] We therefore found that the record did not establish the Petitioner's required intention to permanently employ the Beneficiary in the offered position. We also instructed the Petitioner, in any future filings in this matter, to submit evidence of its intention to continue business activities and to permanently employ the Beneficiary.

Contrary to our instructions, the Petitioner has not submitted evidence of an intention to continue business operations or to employ the Beneficiary in the offered position. Counsel asserts that the Petitioner "intends to continue business operations and permanently employ [the Beneficiary] in the offered position." Counsel's assertion, however, does not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2 (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506). The record therefore does not establish the Petitioner's intention to employ the Beneficiary in the offered position.

IV. CONCLUSION

The Petitioner's motion to reconsider does not establish our misapplication of law or policy in finding insufficient evidence of the company's ability to pay the proffered wage or the Beneficiary's possession of the qualifying experience. Contrary to the instructions in our appellate decision, the filing also lacks evidence demonstrating the Petitioner's continuing ability to pay and its intention to employ the Beneficiary in the offered position.

ORDER: The motion is dismissed.

[2] Online government records continue to indicate the Petitioner's forfeiture of its corporate status. *See* Tex. Comptroller of Pub. Accounts, "Taxable Entity Search," https://mycpa.cpa.state.tx.us/coa/ (last visited Dec. 9, 2020).